

PERISHABLE AGRICULTURAL COMMODITIES ACT**DEFAULT DECISIONS**

In re: MENDENHALL PRODUCE, INC., and PRIMA ROMA SALES, INC. and MICHAEL J. MENDENHALL.

PACA Docket No. D-97-0028 & APP 97-0008.

Decision as to Mendenhall Produce, Inc. by Reason of Default and Dismissal as to Prima Roma Sales, Inc. by Reason of Withdrawal of Application for License filed November 7, 1997.

Failure to file an answer - Failure to appear at hearing - Failure to make full payment promptly - Failure to satisfy reparation orders - Willful, flagrant and repeated violations - Publication.

Eric Paul, for Complainant.

Stephen P. McCarron, Washington, D.C., for Respondents.

Decision & Dismissal issued by Dorothea A. Baker, Administrative Law Judge.

This is disciplinary and show cause proceeding under the Perishable Agricultural Commodities Act, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act," instituted by a notice to show cause and complaint filed against Mendenhall Produce, Inc., and Prima Roma Sales, Inc., on July 18, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United State Department of Agriculture. It is alleged in the complaint that during the period August 1995 through November 1995, respondent Mendenhall Produce, Inc. purchased, received and accepted in interstate commerce, from 16 sellers, 66 lots of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices totaling \$219,913.17. In addition, it is alleged that respondent Mendenhall Produce, Inc. failed to satisfy reparation orders issued to eight of these 16 sellers between May 20, 1996, and December 3, 1996, involving over \$195,000. It is alleged in the notice to show cause that respondent Prima Roma Sales, Inc. should be refused a license because Michael J. Mendenhall, its sole officer and shareholder, has engaged in practices of a character prohibited by the PACA. In addition, it is alleged that respondent Prima Roma Sales, Inc. and Michael J. Mendenhall have made false and misleading statements in the application for license submitted on June 21, 1997.

The notice to show cause and complaint were served upon the respondents by regular mail in accordance with section 1.147 of the Rules of Practice (7 C.F.R. § 1.147) after letters sent by certified mail were returned unclaimed. Pursuant to a telephone conference at which Michael J. Mendenhall appeared on behalf of

respondent Prima Roma Sales, Inc., the notice to show cause and complaint were set for hearing in Phoenix, Arizona, on November 5, 1997. An answer was filed on behalf of respondent Prima Roma Sales, Inc. by Michael J. Mendenhall. This answer was also accepted as a petition for review of the determination of the Chief, PACA Branch, that Michael J. Mendenhall was responsibly connected to Mendenhall Produce, Inc. Pursuant to Section 1.137 of the Rules of Practice (7 C.F.R. § 1.137), the Michael J. Mendenhall petition for review was joined for consolidated hearing with the notice to show cause and complaint proceeding. On October 14, 1997, respondent Prima Roma Sales, Inc. withdrew its application for license.

The time for respondent Mendenhall Produce, Inc. to file an answer admitting, denying, or explaining each of the allegations of the complaint in accordance with Section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) having run, respondent Mendenhall Produce, Inc. having failed to appear at the hearing, and upon the motion of the complainant for issuance of the Default Order, the following Decision and Order is issued in Phoenix, Arizona, at the commencement of the hearing in the remaining responsibly connected appeal proceeding.

Findings of Facts

1. Respondent Mendenhall Produce, Inc. (hereinafter "respondent Mendenhall Produce"), is a corporation organized and existing under the laws of the State of New Mexico. Its business address is 3100 Harrelson, Mesilla Park, New Mexico 88047-1438. Its mailing address is P.O. Box 1438, Mesilla Park, New Mexico 88047-1438.

2. PACA License number 940906 was issued to respondent Mendenhall Produce on March 29, 1994, and terminated on March 29, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), when respondent Mendenhall Produce failed to pay the required annual renewal fee.

3. As more fully set forth in paragraph V of the complaint, during the period August 1995 through November 1995, respondent Mendenhall Produce failed to make full payment promptly to 16 sellers for the agreed purchase prices totaling \$219,913.17 for 66 lots of perishable agricultural commodities which it received and accepted in interstate commerce. In addition, respondent Mendenhall Produce failed to satisfy reparation orders issued to eight of these 16 sellers between May 20, 1996, and December 3, 1996, involving over \$195,000.

Conclusions

Respondent Mendenhall Produce's failure to make full payment promptly with respect to the 66 transactions set forth in Finding of Fact No 3 above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

The notice to show cause should be dismissed because respondent Prima Roma Sales, Inc. has withdrawn its application for license.

Order

A finding is hereby made that respondent Mendenhall Produce, Inc. has committed repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), and such finding shall be published.

The notice to show cause is dismissed.

This Order shall take effect on the eleventh (11th) day after this Decision becomes final. Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceeding thirty-five (35) days after service unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service, as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, .145).

Copies of this Order shall be served upon the parties.

[This Decision and Order became final December 18, 1997.-Editor]

In re: A & E FOODS, INC.

PACA Docket No. D-97-0023.

Decision and Order filed October 23, 1997.

Failure to file an answer - Failure to pay reparation order - Failure to pay required annual license fee - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Jane McCavitt, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter

referred to as the "Act", instituted by a complaint filed on May 16, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period July 1994 through January 1996, respondent purchased, received and accepted, in interstate commerce, from 35 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$525,887.75.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. Respondent, A & E Foods, Inc., was a corporation, organized and existing under the laws of Maryland. Its business mailing address was 8869-C Greenwood Place, Savage, Maryland 20763.

2. Pursuant to the licensing provisions of the Act, license number 830025 was issued to respondent on October 6, 1982. This license was suspended on July 5, 1996, for failure to pay a reparation order, and subsequently terminated on October 6, 1996, pursuant to Section 4(a) of the Act (7 U.S.C. § 499d(a)), when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph III of the complaint, during the period July 1994 through January 1996, respondent purchased, received and accepted in interstate commerce, from 35 sellers, 341 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of \$525,887.75.

Conclusions

Respondent's failure to make full payment promptly with respect to the 341 transactions set forth in Finding of Fact No. 3 above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. § 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final January 9, 1998.-Editor]

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Decision and Order filed January 6, 1998.

Admission of material allegations - Failure to make full payment promptly - Willful, flagrant and repeated violations - Publication.

Andre Vitale, for Complainant.

Peter M. Solomon, Bedford, NH, for Respondent.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "PACA", instituted by a Complaint filed on April 1, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture.

The Complaint alleges that during the period May through November 1995, Queen City Farms, Inc. (hereinafter "Respondent"), failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$713,638.10 for 578 lots of perishable agricultural commodities, which it purchased, received and accepted in interstate commerce. The Complaint also noted that on November 20, 1995, Respondent filed a voluntary petition in the United States Bankruptcy Court for the District of New Hampshire pursuant to

Chapter 7 of the Bankruptcy Code (7 U.S.C. § 7 *et seq.*), designated Case No. 95-12848. Complainant requested that a finding be made that Respondent committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499(4)), and that such findings be published.

Respondent has admitted in documents filed in connection with its Chapter 7 bankruptcy proceeding entitled Schedule F Creditors Holding Unsecured Nonpriority Claims that it owes 19 sellers at least \$713,638.10 which the complaint alleged that respondent failed to fully and promptly pay. This admission warrants the immediate issuance of a decision without hearing by reason of admissions. Therefore, upon the motion of the complainant for the issuance of a decision without hearing by reason of admissions, the following decision is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of the state of New Hampshire. Its business address was 610 Gold Street, Manchester, New Hampshire 03108. Its mailing address was P.O. Box 534, Manchester, New Hampshire 03108-5314.

2. Pursuant to the licensing provisions of the PACA, license number 940834 was issued to Respondent on March 21, 1994. This license terminated on March 21, 1996, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499(a)), when Respondent failed to pay the required annual renewal fee.

3. Respondent, during the period May through November 1995, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased, received and accepted 578 lots of mixed fruits and vegetables with agreed purchase prices in the total of \$713,638.10 from 19 sellers in interstate commerce.

4. On November 20, 1995, Respondent filed a Voluntary Petition pursuant to Chapter 7 of the Bankruptcy Code (7 U.S.C. § 7 *et seq.*) in the United States Bankruptcy Court for the District of New Hampshire. This petition has been designated Case No. 95-12848.

5. Respondent has admitted in bankruptcy pleadings that it owes fixed amounts that total \$859,886.05, an amount greater than which the complaint alleged, to 19 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$713,638.10 in this proceeding. The Schedule F consist of a table containing columns reflecting the name and address of the creditor and the amount of the claim. A comparison between the amounts of the claims of the 19

firms as listed in the complaint and respondent's bankruptcy filing are as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Bankruptcy Pleading</u>
Boston Tomato Co., Inc.	\$55,223.00	\$54,593.00
DiMare Bros., Inc.	43,037.25	44,774.50
Dominic Gandolfo, Inc.	39,526.75	36,861.25
Noyes & Bimber, Inc.	15,022.00	13,842.00
Mutual Produce, Inc.	27,512.15	14,564.00
Marco Tomato Co.	18,723.50	20,795.50
Community-Suffolk, Inc.	69,118.95	101,650.00
Hall & Cole Produce, Inc.	15,221.50	15,221.50
P. Tavilla Co., Inc.	29,778.50	28,986.00
Garden Fresh Salad Co., Inc.	41,099.95	48,115.00
Apples Plus, Inc.	10,435.00	10,708.00
S. Strock & Co., Inc.	43,960.71	72,587.95
W.H. Lailer & Co., Inc.	34,811.93	50,519.10
M. Cutone Mushroom Co.	142,062.29	72,511.70
D'Arrigo Bros., Co	41,681.54	55,722.05
Forlizzi Bros., Inc.	21,391.00	21,258.25
Bay State Produce Co., Inc.	10,906.69	13,780.25
Fresh Start Marketing, Inc.	35,294.30	52,326.50
Lisitano Produce, Inc.	18,831.09	31,069.50
Total	\$713,638.10	\$859,886.05

Conclusions

Respondent has admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 19 sellers at least \$713,638.10 for 578 lots of perishable agricultural commodities on November 20, 1995. Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of Section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent's failures to pay for numerous and substantial produce purchase obligations within the time limits established by a substantive regulation duly promulgated under the PACA are willful as a matter of law. *In re Five Star Food Distributors, supra*. Accordingly, the following Order is issued.

Order

Respondent has committed willful, flagrant and repeated violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

[This Decision and Order became final February 17, 1998.-Editor]

In re: QUEEN CITY FARMS, INC.
PACA Docket No. D-97-0020.
Order Denying Late Appeal filed May 13, 1998.

Late appeal—Default—Admissions in bankruptcy filing—Failure to object to motion for default.

The Judicial Officer denied Respondent's late-filed appeal. The Judicial Officer has no jurisdiction to consider Respondent's appeal filed after Administrative Law Judge Edwin S. Bernstein's Default Decision and Order became final. Even if Respondent's appeal had been timely filed, it would have been denied based both upon Respondent's failure to file objections to Complainant's motion for a default decision and proposed default decision, in accordance with the Rules of Practice (7 C.F.R. § 1.139), and upon Respondent's admissions in a bankruptcy filing that it failed to make full payment promptly to 19 sellers of the agreed purchase prices for perishable agricultural commodities in a total amount of at least \$713,638.10. Publication of the facts and circumstances of violations of 7 U.S.C. § 499b is not dependent on finding that the violations were willful. A violation is willful if, irrespective of evil motive, a person intentionally does an act prohibited by statute or if a person carelessly disregards statutory requirements. Failures to make full payment promptly in numerous transactions over 7 months constitute willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4).

Andre Allen Vitale, for Complainant.
Victor Dahar, Manchester, NH, and Peter M. Solomon, Londonderry, NH, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jensen, Judicial Officer.

The Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)

[hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. §§ 46.1-.48) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing a Complaint on April 1, 1997.

The Complaint alleges that: (1) during the period May 1995 through November 1995, Queen City Farms, Inc. [hereinafter Respondent], failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of \$713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III); (2) on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Compl. ¶ IV(b)); (3) Respondent admitted in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in paragraph III of the Complaint at least \$859,886.05 (Compl. ¶ IV(b)); and (4) the failure of Respondent to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that it purchased, received, and accepted in interstate commerce constitutes willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent filed Respondent's Answer [hereinafter Answer] on May 27, 1997: (1) admitting that on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" (Answer ¶ IV); (2) admitting that Respondent states, in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, that it owes the 19 sellers referred to in paragraph III of the Complaint at least \$859,886.05, but stating that, as of the date of the filing of the Answer, the total amount Respondent owes to the 19 sellers referred to in paragraph III of the Complaint may be less than the amount set forth in *Schedule F - Creditors Holding Unsecured Nonpriority Claims* (Answer ¶ IV); and (3) denying that during the period May 1995 through November 1995 it failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities in the total amount of \$713,638.10, which Respondent purchased, received, and accepted in interstate commerce and stating that the total amount of \$713,638.10 cannot be verified by Respondent (Answer ¶ III).

On November 17, 1997, Complainant filed Motion for Decision Without Hearing by Reason of Admission and Supporting Memorandum [hereinafter Motion for Default Decision] and a proposed Decision Without Hearing by Reason

of Admissions [hereinafter Proposed Default Decision]. Respondent did not file any response to Complainant's November 17, 1997, filings. On January 6, 1998, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] issued Decision Without Hearing by Reason of Admissions [hereinafter Default Decision] in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) in which the ALJ: (1) found that Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848"; (2) found that Respondent has admitted in its bankruptcy pleadings that, as of November 20, 1995, it owed at least \$713,638.10 for 578 lots of perishable agricultural commodities to the 19 sellers that are referred to in paragraph III of the Complaint; (3) concluded that Respondent's admitted failures to make full payment promptly for perishable agricultural commodities constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and circumstances of the violation (Default Decision).

On April 13, 1998, Respondent appealed to, and requested oral argument before, the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).¹ On April 29, 1998, Complainant filed Motion to Dismiss Appeal Petition. On May 5, 1998, Respondent filed Objection to the United States Department of Agriculture's Motion to Dismiss, and on May 7, 1998, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Applicable Statutory Provisions and Regulation

7 U.S.C.:

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

....

§ 499b. Unfair conduct

¹The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.] . . .

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

7 U.S.C. §§ 499b(4), 499h(a).

7 C.F.R.:

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE)

UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

DEFINITIONS

....

§ 46.2 Definitions.

The terms defined in the first section of the [PACA] shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the [PACA], or in the trade shall be construed as follows:

....

(aa) *Full payment promptly* is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. "Full payment promptly," for purpose of determining violations of the [PACA], means:

....

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted[.]

7 C.F.R. § 46.2(aa)(5).

Respondent was served with a copy of the Complaint and a copy of the Rules of Practice on or about April 7, 1997.² Respondent filed a timely Answer admitting that, on November 20, 1995, Respondent filed a voluntary petition, pursuant to Chapter 7 of the Bankruptcy Code, in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848" and that Respondent states in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims* that it owes the 19 sellers referred to in paragraph III of the Complaint at least \$859,886.05.

On November 17, 1997, Complainant filed Motion for Default Decision in

²Letter from Chris Marchand, Claims and Inquiries, United States Postal Service, to Joyce A. Dawson, Hearing Clerk, United States Department of Agriculture, dated June 10, 1997.

which Complainant asserts that Respondent admits in a document entitled *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in a bankruptcy proceeding filed in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," that Respondent owes the 19 sellers identified in paragraph III of the Complaint at least \$713,638.10 for perishable agricultural commodities. Complainant compares the amounts which Respondent is alleged in paragraph III of the Complaint to have failed to pay to 19 sellers in accordance with section 2(4) of the PACA (7 U.S.C. § 499b(4)) to amounts Respondent admits to owing these same 19 sellers in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," as follows:

<u>Seller</u>	<u>Complaint</u>	<u>Bankruptcy Pleading</u>
Boston Tomato Co., Inc.	\$ 55,223.00	\$ 54,593.00
DiMare Bros., Inc	43,037.25	44,774.50
Dominic Gandolfo, Inc.	39,526.75	36,861.25
Noyes & Bimber, Inc.	15,022.00	13,842.00
Mutual Produce, Inc.	27,512.15	14,564.00
Marco Tomato Co.	18,723.50	20,795.50
Community-Suffolk, Inc.	69,118.95	101,650.00
Hale & Cole Produce, Inc.	15,221.50	15,221.50
P. Tavilla Co., Inc.	29,778.50	28,986.00
Garden Fresh Salad Co., Inc.	41,099.95	48,115.00
Apples Plus, Inc.	10,435.00	10,708.00
S. Strock & Co., Inc.	43,960.71	72,587.95
W.H. Lailer & Co., Inc.	34,811.93	50,519.10
M. Cutone Mushroom Co.	142,062.29	172,511.70
D'Arrigo Bros., Co.	41,681.54	55,722.05
Forlizzi Bros., Inc.	21,391.00	21,258.25
Bay State Produce Co., Inc.	10,906.69	13,780.25
Fresh Start Marketing, Inc.	35,294.30	52,326.50
Lisitano Produce, Inc.	<u>18,831.09</u>	<u>31,069.50</u>
Total	\$713,638.10	\$859,886.05

Motion for Default Decision at unnumbered page.

A copy of Complainant's Motion for Default Decision, a copy of Complainant's Proposed Default Decision, and a letter dated November 18, 1997, from the

Hearing Clerk, were served on Respondent by certified mail on November 24, 1997.³ The November 18, 1997, letter from the Hearing Clerk states, as follows:

CERTIFIED RECEIPT REQUESTED

November 18, 1997

Mr. Victor Dahar
Esquire of 20 Merrimack Street
Manchester, New Hampshire 03101

Dear Mr. Dahar:

Subject: In re: Queen City Farms, Inc., Respondent -
PACA Docket No. D-97-0020

Enclosed is a copy of Complainant's Motion for Decision Without Hearing by Reason of Admissions and Supporting Memorandum, together with a copy of the Decision Without Hearing by Reason of Admissions, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,

/s/

JOYCE A. DAWSON
Hearing Clerk

³See Domestic Return Receipt for Article Number P 093 033 773, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating that the date of delivery is November 24, 1997. (The Answer indicates that Respondent was represented by Peter M. Solomon, Esq., of Boutin & Solomon, P.A., Londonderry, New Hampshire. However, on September 30, 1997, Mr. Solomon withdrew from the case and stated that "the only person who can appropriately represent [Respondent] would be the United States Bankruptcy Court Appointed Trustee. The Trustee is Victor Dahar, Esquire of 20 Merrimack Street, Manchester, New Hampshire 03101." (Letter dated September 23, 1997, from Peter M. Solomon to Ms. Linda Hamlin, filed September 30, 1997.) However, Respondent's Appeal from Decision Without Hearing by Reason of Admissions [hereinafter Appeal Petition], filed on April 13, 1998, and Respondent's Objection to the United States Department of Agriculture's Motion to Dismiss, filed May 5, 1998, are signed by Peter M. Solomon of Solomon, P.A., Londonderry, New Hampshire, as attorney for Michael Litvin, former vice-president and director of Respondent.)

Respondent failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

On January 6, 1998, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ filed the Default Decision concluding that Respondent's admitted failures to make full payment promptly to 19 sellers for 578 lots of perishable agricultural commodities in the total amount of at least \$713,638.10 constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Default Decision at unnumbered page).

The Default Decision was served on Complainant on January 8, 1998, and on Respondent on January 10, 1998.⁴ The Default Decision provides:

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the PACA, this Decision will become final without further proceedings 35 days after service hereof, unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § [sic] 1,139 [sic] and 1.145).

Default Decision at unnumbered last page.

A letter from the Office of the Hearing Clerk accompanying the Default Decision states:

CERTIFIED RECEIPT REQUESTED

January 6, 1998

Mr. Victor Dahar
Esquire of 20 Merrimack Street
Manchester, New Hampshire 03101

Dear Mr. Dahar:

Subject: **In re: Queen City Farms, Inc., Respondent-**
PACA Docket No. D-97-0020

⁴See Domestic Return Receipt for Article Number P 093 033 798, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by Victor Dahar, and stating that the date of delivery is January 10, 1998.

Enclosed is a copy of the Decision issued in this proceeding by Administrative Law Judge Edwin S. Bernstein on January 6, 1998.

Each party has thirty (30) days from the issuance of this decision and order in which to file an appeal to the Department's Judicial Officer.

If no appeal is filed, the Decision and Order shall become binding and effective as to each party thirty-five (35) days after its issuance. However, no decision or order is final for purposes of judicial review except a final order issued by the Secretary or the Judicial Officer pursuant to an appeal.

In the event you elect to file an appeal, an original and three (3) copies are required. You are also instructed to consult § 1.145 of the Uniform Rules of Practice (7 C.F.R. § 1.145) for the procedure for filing an appeal.

Sincerely,

/s/

PAMELA M. WRIGHT
Legal Technician

Section 1.145(a) of the Rules of Practice provides that:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

Neither Complainant nor Respondent filed an appeal with the Hearing Clerk within the required time, and on February 20, 1998, the Hearing Clerk issued a Notice of Effective Date of Decision Without Hearing by Reason of Admissions, which was served on Respondent on February 26, 1998.⁵

On April 13, 1998, Respondent filed Respondent's Appeal Petition. For the

⁵See Domestic Return Receipt for Article Number P 368 420 969, addressed to Mr. Victor Dahar, 20 Merrimack Street, Manchester, NH 03101, signed by D. Marlen, and stating the delivery date is February 26, 1998.

reasons set forth below, Respondent's Appeal Petition must be rejected as untimely.

Respondent's Appeal Petition, filed April 13, 1998, was not filed within 35 days after service of the Default Decision on Respondent. In accordance with 7 C.F.R. § 1.139, the Default Decision became final 35 days after service on Respondent, and the Judicial Officer therefore no longer has jurisdiction to consider Respondent's Appeal Petition. It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an initial decision and order becomes final.⁶

The Department's construction of the Rules of Practice is, in this respect, consistent with the construction of the Federal Rules of Appellate Procedure. Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides, in pertinent part,

⁶See *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing respondent's appeal, filed 41 days after the Initial Decision and Order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing respondent's appeal, filed 8 days after the Initial Decision and Order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing respondent's appeal, filed 35 days after the Initial Decision and Order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529, 530 (1994) (dismissing respondents' appeal, filed 2 days after the Initial Decision and Order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing respondent's appeal, filed 14 days after the Initial Decision and Order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing respondent's appeal, filed 7 days after the Initial Decision and Order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing respondent's appeal, filed 6 days after the Initial Decision and Order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing respondent's appeal, filed after the Initial Decision and Order became final); *In re Mary Fran Hamilton*, 45 Agric. Dec. 2395 (1986) (dismissing respondent's appeal, filed with the hearing clerk on the day the Initial Decision and Order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing respondent's appeal, filed 2 days after the Initial Decision and Order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating that it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the Initial Decision and Order becomes final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying respondent's appeal, filed 1 day after Default Decision and Order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating that the Judicial Officer has no jurisdiction to hear an appeal that is filed after the Initial Decision and Order becomes final and effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating that the Judicial Officer has no jurisdiction to consider respondent's appeal dated before the Initial Decision and Order became final, but not filed until 4 days after the Initial Decision and Order became final and effective); *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating that since respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the ALJ nor the Judicial Officer has jurisdiction to consider respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating that failure to file an appeal before the effective date of the Initial Decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating that it is the consistent policy of this Department not to consider appeals filed more than 35 days after service of the Initial Decision).

that:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.—

(1) . . . [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

As stated in *Eaton v. Jamrog*, 984 F.2d 760, 762 (6th Cir. 1993):

We have repeatedly held that compliance with Rule 4(a)(1) is a mandatory and jurisdictional prerequisite which this court may neither waive nor extend. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam); *Myers v. Ace Hardware, Inc.*, 777 F.2d 1099, 1102 (6th Cir. 1985). So strictly has this rule been applied, that even a notice of appeal filed five minutes late has been deemed untimely. *Baker*, 879 F.2d at 1398. . . .^[7]

⁷*Accord Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (since the court of appeals properly held Petitioner's notice of appeal from the decision on the merits to be untimely filed, and since the time of an appeal is mandatory and jurisdictional, the court of appeals was without jurisdiction to review the decision on the merits); *Browder v. Director, Dep't of Corr. of Illinois*, 434 U.S. 257, 264, *rehearing denied*, 434 U.S. 1089 (1978) (under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken; this 30-day time limit is mandatory and jurisdictional); *Martinez v. Hoke*, 38 F.3d 655, 656 (2d Cir. 1994) (per curiam) (under the Federal Rules of Appellate Procedure, the time for filing an appeal is mandatory and jurisdictional and the court of appeals has no authority to extend time for filing); *Price v. Seydel*, 961 F.2d 1470, 1473 (9th Cir. 1992) (filing of notice of appeal within the 30-day period specified in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional, and unless appellant's notice is timely, the appeal must be dismissed); *In re Eichelberger*, 943 F.2d 536, 540 (5th Cir. 1991) (Rule 4(a) of the Federal Rules of Appellate Procedure requires that a notice of appeal be filed with the clerk of the district court within 30 days after entry of the judgment; Rule 4(a)'s provisions are mandatory and jurisdictional); *Washington v. Bumgarner*, 882 F.2d 899, 900 (4th Cir. 1989), *cert. denied*, 493 U.S. 1060 (1990) (the time limit in Fed. R. App. P. 4(a)(1) is mandatory and jurisdictional; failure to comply with Rule 4(a) requires dismissal of the appeal and the fact that appellant is incarcerated and proceeding *pro se* does not change the clear language of the Rule); *Jerningham v. Humphreys*, 868 F.2d 846 (6th Cir. 1989) (Order) (the failure of an appellant to timely file a notice of appeal deprives an appellate court of jurisdiction; compliance with Rule 4(a) of the Federal Rules of Appellate Procedure is a mandatory and jurisdictional prerequisite which this

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing a notice of appeal after an initial decision and order has become final. Under the Federal Rules of Appellate Procedure, the "district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon a motion filed not later than 30 days after the expiration of the time" otherwise provided in the rules for the filing of an appeal (Fed. R. App. P. 4(a)(5)). The absence of such a rule in the Rules of Practice emphasizes that no such jurisdiction has been granted to the Judicial Officer to extend the time for filing an appeal after an initial decision and order has become final.

Moreover, the jurisdictional bar under the Rules of Practice which precludes the Judicial Officer from hearing an appeal that is filed after an initial decision and order becomes final is consistent with the judicial construction of the Administrative Orders Review Act ("Hobbs Act"). As stated in *Illinois Cent. Gulf R.R. v. ICC*, 720 F.2d 958, 960 (7th Cir. 1983) (footnote omitted):

The Administrative Orders Review Act ("Hobbs Act") requires a petition to review a final order of an administrative agency to be brought within 60 days of the entry of the order. 28 U.S.C. § 2344 (1976). This 60-day time limit is jurisdictional in nature and may not be enlarged by the courts. *Natural Resources Defense Council v. Nuclear Regulatory Commission*, 666 F.2d 595, 602 (D.C. Cir. 1981). The purpose of the time limit is to impart finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of those who might conform their conduct to the administrative regulations. *Id.* at 602.^[8]

Accordingly, Respondent's Appeal Petition and request for oral argument must be denied, since they are too late for the matter to be further considered. Moreover, the matter should not be considered by a reviewing court since, under the Rules of Practice, "no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal." (7 C.F.R. §

court can neither waive nor extend).

⁸*Accord Jem Broadcasting Co. v. FCC*, 22 F.3d 320, 324-26 (D.C. Cir. 1994) (the court's baseline standard long has been that statutory limitations on petitions for review are jurisdictional in nature and appellant's petition filed after the 60-day limitation in the Hobbs Act will not be entertained); *Friends of Sierra R.R. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park & Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) (the time limit in 28 U.S.C. § 2344 is jurisdictional).

1.142(c)(4).)

Even if Respondent's Appeal Petition had been timely filed, it would have been denied based upon Respondent's failure to file timely objections to Complainant's Motion for Default Decision. The Rules of Practice and the Hearing Clerk's November 18, 1997, letter clearly provide that Respondent must file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service on Respondent (7 C.F.R. § 1.139). Respondent had ample opportunity during this 20-day period to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. In view of Respondent's admissions in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in connection with its voluntary petition in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," there is no material issue of fact that warrants holding a hearing.⁹ Moreover it is not necessary to show that the undisputed facts prove all the allegations in the Complaint.¹⁰ The same order

⁹See *In re Tolar Farms*, 56 Agric. Dec. 1865, 1878 (1997) (stating that in view of respondents' answer and respondents' promissory notes attached to complainant's motion for a default decision, there is no material issue of fact that warrants holding a hearing); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894 (1997) (stating that in view of respondent's admissions in the documents it filed in a bankruptcy proceeding, there is no material issue of fact that warrants holding a hearing); *In re Potato Sales Co.*, 54 Agric. Dec. 1409, 1413 (1995) (stating that the Chief ALJ correctly held that a hearing was not required where the record, including respondent's bankruptcy documents, shows that respondent has failed to make full payment exceeding a *de minimis* amount), *appeal dismissed*, No. 95-70906 (9th Cir. Nov. 8, 1996).

¹⁰The Complaint alleges that Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices for 578 lots of perishable agricultural commodities, in the total amount of \$713,638.10, which Respondent purchased, received, and accepted in interstate commerce (Compl. ¶ III). Respondent admits in its bankruptcy filing that it owes these same 19 sellers \$859,886.05. Respondent admits in its bankruptcy filing that it owes the same amount as alleged in paragraph III of the Complaint to one of these perishable agricultural commodity sellers: Hale & Cole Produce, Inc. Respondent asserts in its bankruptcy filing that it owes more than the amounts alleged in paragraph III of the Complaint to 12 of these perishable agricultural commodity sellers: DiMare Bros., Inc.; Marco Tomato Co.; Community-Suffolk, Inc.; Garden Fresh Salad Co., Inc.; Apples Plus, Inc.; S. Strock & Co., Inc.; W.H. Lailer & Co., Inc.; M. Cutone Mushroom Co.; D'Arrigo Bros., Co.; Bay State Produce Co., Inc.; Fresh Start Marketing, Inc.; and Lisitano Produce, Inc. Respondent asserts in its bankruptcy filing that it owes \$630 less than the amount alleged in paragraph III of the Complaint (\$55,223) to Boston Tomato Co., Inc.; \$2,665.50 less than the amount alleged in paragraph III of the Complaint (\$39,526.75) to Dominic Gandolfo, Inc.; \$1,180 less than the amount alleged in paragraph III of the Complaint (\$15,022) to Noyes & Bimber, Inc.; \$12,948.15 less than the amount alleged in paragraph III of the Complaint (\$27,512.15) to Mutual Produce, Inc.; \$792.50 less than the amount alleged in paragraph III of the Complaint (\$29,778.50) to P. Tavilla Co., Inc.; and \$132.75 less than the amount alleged in paragraph III of the Complaint (\$21,391) to Forlizzi Bros., Inc. (Complainant's Motion for Default Decision).

would be issued in this case unless the proven violations are *de minimis*.¹¹

Although on rare occasions default decisions have been set aside for good cause shown or where Complainant did not object,¹² Respondent has shown no basis for setting aside the Default Decision. The record establishes that Respondent admits in *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, which Respondent filed in connection with its voluntary petition in the United States Bankruptcy Court for the District of New Hampshire, in a case designated "Case No. 95-12848," that it owes at least \$713,638.10 to the 19 sellers to whom Complainant alleges Respondent failed to make full payment promptly, in violation of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) are repeated, flagrant, and willful, as a matter of law. Respondent's violations are "repeated" because repeated means more than one, and Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the time period during which the violations occurred.¹³

¹¹*In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 894-95 (1997); *In re Tri-State Fruit & Vegetable, Inc.*, 46 Agric. Dec. 81 (1984) (Ruling on Certified Question); *In re Fava & Co.*, 46 Agric. Dec. 79 (1984) (Ruling on Certified Question).

¹²*In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (default decision set aside because facts alleged in the Complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the Complaint by registered and regular mail was returned as undeliverable, and Respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Henry Christ, L.A.W.A.* Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Vaughn Gallop*, 40 Agric. Dec. 217 (order vacating default decision and case remanded to determine whether just cause exists for permitting late Answer), *final decision*, 40 Agric. Dec. 1254 (1981).

¹³*See, e.g., Farley & Calfee v. United States Dep't of Agric.*, 941 F.2d 964, 968 (9th Cir. 1991) (holding that 51 violations of the payment provisions of the PACA falls plainly within the permissible definition of repeated); *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F.2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Wayne Cusimano, Inc. v. Block*, 692 F.2d 1025, 1029 (5th Cir. 1982) (holding 150 transactions occurring over a 15-month period involving over \$135,000 to be frequent and flagrant violations of the payment provisions of the PACA); *Reese Sales Co. v. Hardin*, 458 F.2d 183, 187 (9th Cir. 1972) (finding 26 violations of the payment provisions of the PACA involving \$19,059.08 occurring over 2½ months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110, 115 (2d Cir.) (concluding that because the 295 violations of the payment provisions of the PACA did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding the 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000), *cert. denied*, 389 U.S. 835 (1967); *In re Scamcorp, Inc.*, 57 Agric. Dec. ____ (Jan. 29, 1998)

Willfulness is not a prerequisite to publication of facts and circumstances of violations of 7 U.S.C. § 499b or the applicability of restrictions on employment provided in 7 U.S.C. § 499h(b). Nonetheless, the record supports a finding that Respondent's violations of 7 U.S.C. § 499b(4) were willful.

A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements.¹⁴ Willfulness is reflected by

(concluding that respondent's failure to pay 35 sellers \$634,791.13 for 165 transactions involving perishable agricultural commodities, during the period of April 1993 through June 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Allred's Produce*, 56 Agric. Dec. 1884 (1997) (concluding that respondent's failure to pay 19 sellers \$336,153.40 for 86 lots of perishable agricultural commodities, during the period of May 1993 through February 1996, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865 (1997) (holding that respondents' failure to pay 7 sellers \$192,089.03 for 46 lots of perishable agricultural commodities, during the period of July 1995 through September 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917 (1997) (concluding that respondent's failure to pay 18 sellers \$206,850.69 for 62 lots of perishable agricultural commodities, during the period of March 1993 through December 1993, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880 (1997) (concluding that respondent's failure to pay 14 sellers \$238,374.08 for 174 lots of perishable agricultural commodities, during the period of May 1994 through March 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234 (1996) (concluding that respondent Havana Potatoes of New York Corporation's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities, during the period of February 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4) and respondent Havpo, Inc.'s failure to pay six sellers \$101,577.50 for 23 lots of perishable agricultural commodities, during the period of August 1993 through January 1994, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204 (1996) (concluding that respondent Andershock Fruitland, Inc.'s failure to pay 11 sellers \$245,873.41 for 113 lots of perishable agricultural commodities, during the period of May 1994 through May 1995, constitutes willful, flagrant, and repeated violations of 7 U.S.C. § 499b(4)), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re James Metcalf*, 1 Agric. Dec. 716 (1942) (holding that the failure to pay for 134 crates of berries and purporting to pay for the berries with bad checks constitutes a flagrant violation of section 2 of the PACA); *In re Harry T. Silverfarb*, 1 Agric. Dec. 637 (1942) (concluding that respondent's failure to pay for 3 shipments of perishable agricultural commodities constitutes flagrant and repeated violations of section 2 of the PACA); *In re Sol Junsberg*, 1 Agric. Dec. 540 (1942) (concluding that respondent's failure to pay for 3 carloads of apples and one carload of potatoes constitutes repeated violations of the PACA).

¹⁴See, e.g., *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir. 1991), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960); *In re*

Respondent's violations of express requirements of the PACA (7 U.S.C. § 499b(4)) and the Regulations (7 C.F.R. § 46.2(aa)) and in the length of time during which the violations occurred and the number and dollar amount of violative transactions involved.¹⁵ Respondent failed to make full payment promptly to 19 sellers of the agreed purchase prices in the total amount of \$713,638.10 for 578 lots of perishable agricultural commodities which Respondent had purchased, received, and accepted in interstate commerce. These failures to pay took place over the period May 1995 through November 1995.

Scamcorp, Inc., 57 Agric. Dec. ___, slip op. at 34 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1905-06 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879 (1997); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 917, 925 (1997), *appeal docketed*, No. 97-4224 (2d Cir. Aug. 1, 1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895-96 (1997); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1244 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1204, 1232-33 (1996), *appeal docketed*, Nos. 96-3558 & 96-4238 (7th Cir. Dec. 30, 1996); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 626 (1996); *In re Moreno Bros.*, 54 Agric. Dec. 1425, 1432 (1995); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1330 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 118 S. Ct. 372 (1997); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("Willfully" could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Even under this more stringent definition, Respondent's violations were willful.

¹⁵*See Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 94 (2d Cir. 1997); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 781-82 (D.C. Cir. 1983); *In re Scamcorp, Inc.*, 57 Agric. Dec. ___, slip op. at 34-35 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1906-07 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1879-80 (1997); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 880, 895 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 629 (1996); *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375, 1378 (1995); *In re National Produce Co.*, 53 Agric. Dec. 1622, 1625 (1994); *In re Samuel S. Napolitano Produce, Inc.*, 52 Agric. Dec. 1607, 1612 (1993); *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 643-53 (1989).

Respondent knew, or should have known, that it could not make prompt payment for the large amount of perishable agricultural commodities it ordered. Nonetheless, Respondent continued over a 7-month period to make purchases knowing it could not pay for the produce as the bills came due. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent did not have sufficient capitalization; and consequently, could not pay its suppliers of perishable agricultural commodities. Respondent deliberately shifted the risk of nonpayment to sellers of the perishable agricultural commodities. Under these circumstances, Respondent has both intentionally violated the PACA and operated in careless disregard of the payment requirements in section 2(4) of the PACA (7 U.S.C. § 499b(4)), and Respondent's violations are, therefore, willful.¹⁶

Accordingly, the Default Decision was properly issued in this proceeding. Application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the United States Constitution. *See United States v. Hulings*, 484 F. Supp. 562, 568-69 (D. Kan. 1980).

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"¹⁷ If Respondent were permitted to contest some of the allegations of fact after admitting the material

¹⁶*See In re Scamcorp, Inc.*, 57 Agric. Dec. ____, slip op. at 36 (Jan. 29, 1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1907 (1997), *appeal docketed*, No. 98-60187 (5th Cir. Apr. 3, 1998); *In re Tolar Farms*, 56 Agric. Dec. 1865, 1880-81 (1997); *In re Hogan Distrib., Inc.*, 55 Agric. Dec. 622, 630 (1996); *In re The Norinsberg Corp.*, 52 Agric. Dec. 1617, 1622 (1993), *aff'd*, 47 F.3d 1224 (D.C. Cir.), *cert. denied*, 516 U.S. 974 (1995); *In re Kornblum & Co.*, 52 Agric. Dec. 1571, 1573-74 (1993); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 622 (1993); *In re Vic Bernacchi & Sons, Inc.*, 51 Agric. Dec. 1425, 1429 (1992); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1641 (1976), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (Table), *cert. denied*, 439 U.S. 819 (1978).

¹⁷*Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), *quoting from FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). *Accord Silverman v. CFTA*, 549 F.2d 28, 33 (7th Cir. 1977). *See Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 (1st Cir. 1979) (absent law to the contrary, agencies enjoy wide latitude in fashioning procedural rules); *Nader v. FCC*, 520 F.2d 182, 195 (D.C. Cir. 1975) (the Supreme Court has stressed that regulatory agencies should be free to fashion their own rules of procedure and to pursue methods for inquiry capable of permitting them to discharge their multitudinous duties; similarly this court has upheld in the strongest terms the discretion of regulatory agencies to control disposition of their caseload); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962) (administrative convenience or even necessity cannot override constitutional requirements, however, in administrative hearings, the hearing examiner has wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed).

allegations in the Complaint, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. There is no basis for permitting Respondent to present matters by way of defense at this time.

For the foregoing reasons, the following Order should be issued.

Order

Respondent's Appeal from Decision Without Hearing by Reason of Admissions, filed April 13, 1998, is denied. The Decision Without Hearing by Reason of Admissions, filed by Administrative Law Judge Edwin S. Bernstein on January 6, 1998, is the final Decision and Order in this proceeding.

In re: PETER DeVITO COMPANY, INC.

PACA Docket No. D-97-0014.

Decision and Order filed July 29, 1997.

Admission of material allegations - Official notice of bankruptcy documents - Failure to make full payment promptly - Willful, flagrant and repeated violations.

Eric Paul, for Complainant.

Respondent, Pro se.

Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended, (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "PACA", instituted by a Complaint filed on January 14, 1997, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It was alleged in the complaint that respondent had committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) by failing to make full payment promptly to 11 sellers for purchases of 181 lots of perishable agricultural commodities in the course of interstate commerce in the amount of \$1,202,849.65 during the period April 1995 through August 1996. The complaint also alleged that on October 25, 1996, respondent filed a Voluntary Petition in the United States Bankruptcy Court for the Eastern District of Massachusetts pursuant to Chapter 11 of the Bankruptcy

Code(11 U.S.C. § 1100 *et seq.*), designated Case No. 96-18215-JNF, in which respondent admitted owing ten of the eleven sellers named in the complaint amounts totaling \$1,243,119.85. Complainant requested that, as a result of respondent's violations of the PACA, a finding should be made that respondent committed willful, flagrant and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), and further requested that respondent's license be revoked.

Respondent submitted an answer on February 19, 1997, in which it admitted that it purchased, received and accepted the lots of perishable agricultural commodities alleged in the complaint, but denied that it willfully failed to promptly pay the prices therefor. No explanation was offered in support of this denial. Respondent admitted filing the bankruptcy petition alleged, and in response to the allegation that respondent in Schedule F of its bankruptcy petition admitted owing ten of the eleven sellers named in the complaint amounts that total \$1,243,119.80, respondent further stated that said Schedule F speaks for itself.

Complainant filed a request that official notice be taken of the documents filed by respondent in its bankruptcy proceeding, and a motion with supporting memorandum seeking a decision without hearing by reason of admissions made by respondent in its answer and in its bankruptcy petition and schedules. Based upon a careful consideration of the pleadings and precedent decisions cited by complainant, official notice is taken of the bankruptcy documents filed by respondent and this decision is issued without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Pertinent Statutory Provisions

7 U.S.C. § 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought and sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or *to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in such commodity to the person with whom such transaction is had*; or to fail, without reasonable cause, to perform any

specification or duty, express or implied, arising out of any undertaking in connection with any such transaction; or to fail to maintain the trust as required under section 499e(c) of this title. However, this paragraph shall not be considered to make the good faith offer, solicitation, payment, or receipt of collateral fees and expenses, in and of itself, unlawful under this chapter. (emphasis added).

7 U.S.C. § 499h. Grounds for suspension and revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulation

7 C.F.R. § 46.2 Definitions.

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act means:

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

Findings of Fact

1. Peter DeVito Company, Inc. (hereinafter "respondent"), is a corporation organized and existing under the laws of the State of Massachusetts. Its business and mailing address is 34 Market Street, Everett, Massachusetts 02149.

2. At all times material herein, respondent was licensed under the provisions of the PACA. License number 890002 was issued to respondent on October 3, 1988. This license has been renewed annually and is next subject to renewal on or before October 3, 1997.

3. Respondent, during the period April 1995 through August 1996, on or about the dates and in the transactions set forth in paragraph III of the complaint, purchased, received, and accepted 181 lots of vegetables with agreed purchase prices in the total amount of \$1,202,849.65 from 11 sellers in interstate commerce.

4. On October 25, 1996, respondent filed a Voluntary Petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. § 1100 *et seq.*) in the United States Bankruptcy Court for the Eastern District of Massachusetts. This petition has been designated Case No. 96-18215-JNF.

5. Respondent has admitted in bankruptcy pleadings of which the Secretary may take official notice that it owes fixed amounts that total \$1,243,119.85 to 10 of the 11 sellers that are alleged to be unpaid for agreed purchase prices in the total amount of \$1,202,849.65 in this proceeding. Bankruptcy Schedule F contains a table with columns for the name and address of the creditor and the amount of the claim. Included among the 20 creditors named are 10 of the firms listed in the complaint, with the amounts of their claims. A comparison with the table set forth in paragraph III of the complaint reveals that the amounts acknowledged as owed by respondent are identical for six of the produce sellers, slightly higher for three of the produce sellers, and slightly lower for one of the produce sellers. One produce firm alleged to be unpaid for \$12,873.50 in the complaint, Robert O. Davenport & Sons, is not identified as a creditor on Schedule F. The amounts alleged unpaid by complainant and admitted unpaid by respondent with respect to the other ten produce firms are as follows:

Seller	Complaint	Schedule F
TGT, Inc.	\$147,405.90	\$147,405.90
R.D. Clifton Produce Company	8,167.00	8,167.00
James J. Piedmont & Sons, Inc.	60,484.00	60,484.00

M & R Company	53,411.35	52,646.00
Talley Farms	19,329.50	19,329.00
C-T Sales, Inc.	28,999.00	28,999.00
Cayuga Produce, Inc.	9,614.50	9,614.00
Windsor Distributing, Inc.	289,766.95	317,000.00
Walden-Sparkman, Inc.	423,975.90	444,258.15
John Molinelli, Inc.	<u>148,822.05</u>	<u>155,216.80</u>
	\$1,189,976.15	\$1,243,119.85

6. Respondent purchased perishable agricultural commodities from TGT, Inc. and Windsor Distributing, Inc. in 51 unpaid transactions where payment was due within 21 days from the dates on which the lots were delivered and accepted as set forth in paragraph III of the complaint. Payments due between April 26, 1995 and February 16, 1996 in these 51 transactions were 8 to 18 months past due when respondent filed its Chapter 11 Petition on October 25, 1996.

7. Respondent purchased perishable agricultural commodities from the other eight sellers named above in 127 unpaid transactions where payment was due within 10 days from the dates on which the lots were delivered and accepted as set forth in paragraph III of the complaint. Payments due between July 17, 1995 and August 11, 1996 in these 127 transactions were 2 to 15 months past due when respondent filed its Chapter 11 Petition on October 25, 1996.

Conclusions of Law

Respondent has admitted in its answer that it purchased, received and accepted from 11 sellers, during the period April 1995 through August 1996, 181 lots of vegetables in interstate commerce having agreed purchase prices in the total amount of \$1, 202,849.65. Respondent has further admitted in the petition and schedules that were filed in its bankruptcy proceeding that it still owed 10 of these 11 sellers at least \$1,189,976.15 for 178 of these lots of perishable agricultural commodities on October 25, 1996.¹ Respondent's admitted failures to make full payment promptly constitute willful, flagrant and repeated violations of section

¹Official notice is hereby taken of these documents as authorized by *In re Five Star Food Distributors, Inc.*, PACA Docket No. D-96-0521 (January 23, 1997), 56 Agric. Dec. __; *In re Granoff's Wholesale Fruit & Produce, Inc.*, 54 Agric. Dec. 1375 (1995); *In re Veg-Mix, Inc.*, 44 Agric. Dec. 1583 (1985), remanded on other grounds, *Veg-Mix, Inc. v. U.S. Dep't of Agriculture*, 832 F.2d 601 (D.C. Cir. 1987).

2(4) of the PACA (7 U.S.C. § 499b(4)).² Respondent's failures to pay for numerous and substantial produce purchase obligations, which respondent has acknowledged as liquidated, undisputed and non contingent debts, within the time limits established by a substantive regulation duly promulgated under the PACA are willful as a matter of law³, and respondent's denials in its answer that " it willfully failed to promptly pay the prices therefor" and "it willfully and flagrantly violated Sec. 2(4) of the P.A.C.A. (7 U.S.C. sec. 499b(4))" do not establish the existence of a bona fide dispute as to material facts that would require the holding of a hearing pursuant to the Rules of Practice in the proceeding.⁴ The appropriate sanction for repeated or flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4) when the respondent has a valid PACA license is revocation of license.⁵ Accordingly, the following Order should be issued.

²See, e.g., *Melvin Beene Produce Co. v. Agricultural Marketing Service*, 728 F. 2d 347, 351 (6th Cir. 1984) (holding 227 transactions occurring over a 14-month period to be repeated and flagrant violations of the PACA); *Reese Sales Co. v. Hardin*, 458 F. 183 (9th Cir. 1972)(finding 26 violations involving \$19,059.08 occurring over 2 1/2 months to be repeated and flagrant); *Zwick v. Freeman*, 373 F.2d 110,115 (2d Cir. 1967)(concluding that because the 295 violations did not occur simultaneously, they must be considered "repeated" violations within the context of the PACA and finding 295 violations to be "flagrant" violations of the PACA in that they occurred over several months and involved more than \$250,000); *In re Havana Potatoes of New York Corp. and Havpo, Inc.*, 55 Agric. Dec. 1234 (1996), *appeal docketed*, No. 97-4053 (2d Cir. April 2, 1997) (Havana's failure to pay 66 sellers \$1,960,958.74 for 345 lots of perishable agricultural commodities during the period of February 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4), and Havpo's failure to pay 6 sellers \$101,577.50 for 23 lots of perishable agricultural commodities during the period of August 1993 through January 1994 constitutes willful, flagrant and repeated violations of 7 U.S.C. § 499b(4)); and *In re Five Star Food Distributors*, *supra*, slip op. at 18 (holding that 174 violations involving 14 sellers and at least \$238,374.08 over a 11 month period were "willful, repeated, and flagrant, as a matter of law").

³*Id.*

⁴A respondent's evil intent need not be established for a violation to be willful, provided the record shows that the respondent acted with careless disregard of statutory requirements. The admissions in this case establish a gross neglect of the express provisions of the PACA and a substantive regulation known by respondent to require prompt payment. See, *In re Five Star Food Distributors, Inc.*, *supra*, slip op. At 20-21, and 7 C.F.R. § 46.2(aa)(5),(11).

⁵See, *In re The Caito Produce Co.*, 48 Agric. Dec. 602, 612, 620-627 (1989)(reviewing the goal of having only financially responsible persons operating and the special exception provided in 11 U.S.C. § 525 for enforcement of the PACA); and *In re Andershock Fruitland, Inc., and James A. Andershock, d/b/a AAA Recovery*, 55 Agric. Dec. 1204,1224-28 (1996), *appeal docketed*, No. 96-4238 (7th Cir. Dec. 30, 1996)(the license revocation requirement set forth in *Caito* is not altered by the Department's new sanction policy articulated in See *In re SS. Linn County, Inc.*, 50 Agric. Dec. 476 (1991)).

Order

Respondent Peter DeVito Company, Inc.'s PACA license is hereby revoked.

This Order shall become final and effective thirty-five (35) days after service hereof upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies thereof shall be served upon the parties.

[This Decision and Order became final February 25, 1998.-Editor]

**In re: GEORGE TOWELL DISTRIBUTORS, dba FANTASTIC PRODUCE.
PACA Docket No. D-98-0004.
Decision and Order filed April 16, 1998.**

Failure to file timely answer - Failure to make full payment promptly - Willful, flagrant, and repeated violations.

Andre Vitale, for Complainant.

Respondent, Pro se.

Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S. C. § 499a *et seq.*) (PACA), which was instituted on December 16, 1997, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture, by the filing of a complaint alleging that Respondent failed to account and make full payment promptly of the net proceeds, in the total amount of \$576,334.45, due to three growers for perishable agricultural commodities which it received, accepted, and sold on behalf of those growers in interstate commerce between January 1995 and July 1996. The complaint also alleges that Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of \$692,221.72, to sixteen (16) sellers for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between April 1995 through July 1996. A copy of the complaint was served on Respondent December 31, 1997, and Respondent did not file an answer. The period for filing a timely answer has elapsed.

As a result of the Respondent's failure to file an answer within the time required by section 1.136 of the Rules of Practice governing this proceeding (7

C.F.R. § 1.136), Complainant filed a motion for the issuance of a default decision. Accordingly, the following Decision Without Hearing by Reason of Default is issued without further investigation or hearing, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Finding of Fact

1. George Towell Distributors, herein referred to as Respondent, is a corporation doing business as Fantastic Produce, organized and existing under the laws of State of Florida with a business address of 1131 N.W. 9th Street, Belle Glade, Florida 33430 and a business mailing address of P.O. Box 159, Belle Glade, Florida 33430-0159.

2. PACA license number 910137 was issued to Respondent on November 1, 1990. This license was suspended on November 5, 1996, because Respondent failed to pay a reparation order that had been entered against it. Respondent's PACA license was terminated on November 1, 1997, pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)), because it failed to pay the required annual renewal fee.

3. As set forth more fully in paragraph III of the complaint, Respondent failed to account and make full payment promptly of the net proceeds due, in the total amount of \$576,334.45, to three growers for perishable agricultural commodities which it received, accepted, and sold on behalf of those growers in interstate commerce between January 1995 and July 1996.

4. As set forth more fully in paragraph IV of the complaint, Respondent failed to fully and promptly pay the agreed purchase prices, in the total amount of \$692,221.72, to sixteen (16) sellers for 204 lots of perishable agricultural commodities which it purchased, received, and accepted in interstate commerce between April 1995 and July 1996.

Conclusions

Respondent's failures to remit the net proceeds due to three growers and its failures to make full payment promptly to sixteen sellers, as set forth above in Findings of Fact 3 and 4, constitute willful, repeated, and flagrant violations of Section 2 of the PACA (7 U.S.C. § 499b), for which the order below is issued.

Order

Respondent is found to have committed willful, flagrant, and repeated violations of Section 2 of the PACA (7 U.S.C. § 4996b).

The facts and circumstances of Respondent's violations of the PACA shall be published.

As provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139, 1.145), this Decision will become final without further proceedings thirty-five (35) days after service hereof unless appealed to the Secretary by a party to the proceeding within thirty (30) days after service.

Copies hereof shall be served upon the parties.

[This Decision and Order became final June 1, 1998.-Editor]

In re: BOBBY E. ROBERTSON, dba BOBBY ROBERTSON PRODUCE.

PACA Docket No. D-98-0009.

Decision and Order filed April 20, 1998.

Failure to file answer - Failure to make full payment promptly - Willful, repeated, and flagrant violations.

Mary Hobbie, for Complainant.

Respondent, Pro se.

Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a Complaint filed on January 2, 1998, by the Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period December 1994 through December 1996, respondent failed to make full payment promptly to 10 sellers in the total amount of \$426,170.11 for 42 lots of perishable agricultural commodities it purchased, received and accepted in interstate commerce.

A copy of the Complaint was mailed to the respondent by certified mail on January 2, 1998, returned unclaimed on February 6, 1998, and was mailed again by regular mail on February 10, 1998. This complaint has not been answered. The time for filing an answer having run, and upon motion of the complainant for the issuance of a default order, the following Decision and Order shall be issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Bobby Robertson, d/b/a Bobby Robertson Produce, was a corporation organized and existing under the laws of the State of Alabama. Its business address was 414 Finley Avenue, Birmingham, Alabama 35207. Its mailing address was Route One, Box 2595, Oneonta, Alabama 35121.

2. At all times material herein, respondent was licensed under the provisions or operating subject to the provisions of the PACA. PACA license number 950699 was issued to respondent on February 9, 1995. This license terminated on February 9, 1997, when respondent failed to pay the required annual renewal fee pursuant to Section 4(a) of the PACA (7 U.S.C. § 499d(a)).

3. As more fully set forth in paragraph 3 of the complaint, during the period of December 1994 through December 1996, respondent purchased, received and accepted, in interstate commerce from 10 sellers, 42 shipments of perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balance thereof in the total amount of \$426,170.11.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2(4) of the Act (7 U.S.C. § 499b(4)), for which the Order below is issued.

Order

A finding is made that Respondent has committed willful, repeated and flagrant violations of Section 2(4) of the Perishable Agricultural Commodities Act (7 U.S.C. § 499b(4)), and the facts and circumstances set forth above shall be published.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceedings within thirty days after service as provided in Sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This Decision and Order became final July 16, 1998.-Editor]